**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**IN ITS ADMIRALTY & VICE ADMIRALTY JURISDICTION**
**ADMIRALTY SUIT NO. 111 OF 1997**

1.Unique Pharmaceutical Laboratories
2.The Oriental Insurance Co. Ltd.,..**Plaintiffs**

***Versus***

1. M.V. "Contship Atlantic"
2. Contship Container Lines Ltd.,
3. Samrat Shipping & Transport Systems Pvt.Ltd., ***.. Defendants***

Shri Desai learned Senior Advocate for the Plaintiffs
Shri Nichani learned Advocate for the defendants

***CORAM : S.R. SATHE,J.***
***DATED : 08/02/2007***

**JUDGEMENT** :-

1. Plaintiffs have filed this suit against the defendants for recovery of the amount of Rs. 27,17,806/- together with future interest on the said amount at the rate of 18% p.a. from the date of filing of the suit till the date of realization.

2. The Plaintiff's case in brief is that Plaintiff No.1 is a Public Limited Company engaged in the manufacture of pharmaceutical products and having its registered office at Mumbai.

3. The first defendant vessel M.V."Contship Atlantic" is a merchant vessel flying a foreign flag which at the material time was owned by second defendant who are having their head office at Petersburg, Russia. The third defendant are doing business as Shipping agent at Mumbai for and on behalf of second defendant and having their office at Bandra-Kurla Complex, Bandra, Mumbai.

4. On 28/10/1996, Plaintiff No.1 shipped to their buyers State Enterprise Pharmacy Warehouse N1, Moscow, Russia, the cargo consisting of 631 cartons containing various pharmaceutical products. It was shipped under 4 invoices bearing Nos. 5278 dated 13/09/1996, 5352 & 5353 dated 11/10/1996 & 5317 dated 24/09/1996. The said cargo was valued at US $ 75,709/-. The cargo was well packed and accepted by the third defendant on behalf of second defendant for carriage and safe delivery ex-JNPT Nava Sheva to flexistowe for onward carriage therefrom to Moscow being the final destination. The said cargo which stuffed into F.C.L. Container No. TRIU 217035-4 was entrusted to the third defendant and the third defendant issued a clean 'on board' bill of lading bearing No. EUACSAMBBYT 43516 dated 28/10/1996, at Mumbai on behalf of second defendants.

5. The first defendant vessels reached the designated port and thereafter the FCL Container containing the plaintiff's cargo was transported by road to Moscow for delivery to the consignees' warehouse. The said container was entrusted to “ZAO MCT Transit Service” by the second defendant for onward carriage. However, the driver of the truck carrying Plaintiff's container failed to deliver the same to consignee and instead mis-delivered it to persons proclaiming themselves to be the consignees. The driver and the firm were penalized for violation of the local statute in Russia. The information was reflected in the decision of “THE STATE CUSTOMS COMMITTEE OF THE RUSSIAN FEDERATION DECISION”.

6. On 09/04/1997 the Plaintiff No.1 lodged their monetary claim with third defendant for their failure to deliver the container to the consignee at Moscow. The defendants, however, failed and neglected to settle the claim. According to Plaintiff No.1, they were the owners and shippers of the aforesaid cargo. Due to non delivery of the same to the consignee, Plaintiff remained unpaid vendor to the extent of entire value of their cargo. Hence, Plaintiff No.1 filed the present

suit for recovery of loss of US $ 77,651.60/- equivalent to Rs. 27,17,806/-.

7. On 9th July, 2002, the original Plaintiff Unique Pharmaceutical Laboratories amended the plaint and joined Oriental Insurance Company Limited as Plaintiff No.2 and averred that Plaintiff No.1 had obtained insurance policy from Plaintiff No.2 on 28/10/1996 in respect of the suit consignment. For value of the consignment of 631 cartons non delivery at the destination, the Plaintiff No.2 Insurance Company settled the claim of the Plaintiff for a sum of Rs. 30,29,732/-. The Plaintiff No.1 thereafter in pursuance of the settlement of their claim executed a letter of subrogation and special power of attorney in favour of Plaintiff No.2 Insurance Company. Thus, by virtue of the said letter of subrogation and special power of attorney, Plaintiff No.2 became entitled to recover the said amount but the Plaintiff No.1 continued as party to the suit by way of abundant care and caution. The Plaintiff therefore claimed that Plaintiff No.2 is entitled to recover the amount of Rs.27,17,806/- together with future interest at the rate of 18% p.a. from the defendant.

8. The defendant Nos. 1 and 2 filed their Written Statement and resisted the suit claim on several grounds. Firstly, they contended that this Court has no jurisdiction to try the suit because on the date of filing of the suit first defendant vessel was neither birthed at JNPT Nava Sheva nor it was within territorial waters of India. Besides this, they contended that admittedly no part of the cause of action has arisen within the jurisdiction of this court. Even according to Plaintiff, the consignment was stolen or wrongly delivered when it was in the custody of the road carriers. According to defendants, mere loading of the consignment at Mumbai would not give cause of action to Plaintiff because even according to Plaintiff the consignment was stolen or mis-delivered at Moscow. The defendant also contended that even if it is assumed that part of cause of action has arisen within the jurisdiction of this Court, no leave under clause-12 of the Letters Patent has been taken by the Plaintiff particularly when these defendants carry out business outside India and third defendants are not special agents of these defendants in India. Hence, the defendant Nos. 1 & 2 contended that this Court has no jurisdiction.

9. Secondly, the defendant contended that as per clause-18 of the bill of lading it was necessary to refer the dispute in question to arbitration in London. Hence on this ground also the suit is not tenable.

10. Thirdly, the defendants contended that Plaintiffs' claim is barred by law of limitation in view of section 24 of Multi Model Transportation of Goods Act, 1993 which requires the Plaintiff to bring action within 9 months from the date, consignment ought to have been delivered to the Consignee.

11. Fourth contention taken by the defendant is that even according to Plaintiff's, consignment was stolen while in the custody of the Road Carriers i.e.“ZAO MCT Transit Service” but the said transport company or carriers have not been joined as defendant and suit is bad for non-joinder of necessary party.

12. The 5th contention taken by the defendant is that as per clause-4(A)(i) of the said bill of lading issued by the defendant, the defendants are discharged from liability once the consignment is discharged from the vessels rails. So, defendants are not liable to pay any amount, as alleged loss has taken place after the

consignment was discharged. Not only that but as per clause-4(B)(ii) r/w. Clause-7 of the bill of lading, the defendant Nos. 1 and 2 are not liable to pay to Plaintiff for the alleged loss, unless they have recovered any sum from the Road carriers or third party to whom the said defendants had entrusted the consignment for further carriage. As defendant Nos. 1 and 2 have not recovered any amount from the road carriers i.e. M/s.“ZAO MCT Transit Service”, they are not liable to pay any amount to Plaintiffs.

13. The defendants also contended that they and third defendant are exonerated from any liability in view of the terms and conditions embodied in the bill of lading.

14. The defendants also contended that they were not aware whether Plaintiff had shipped to their buyer cargo consisting of 631 cartons containing various pharmaceutical products and that the value of the same was US$ 75,709/- particularly when on the reverse of the bill of lading there was specific endorsement that particulars declared by the Shipper not checked by the carrier and weight, measures, marks, numbers, quantity, condition, contents and value of the goods are unknown

to the carriers. The defendant also contended that they carried out their duty in proper way and their responsibility ceased when they handed over the consignment to M/s.ZAO MCT Transit Service. The defendants also denied that they failed in their contractual obligation. The defendants therefore contended that they are not liable to pay the amount claimed by the Plaintiff.

15. The defendant No.3 filed their Written Statement and took similar contentions. Besides this, the defendant No.3 contended that they have acted as agents for a disclosed foreign principles and in view of section 230 of the Contract Act, 1872. They are not personally liable to pay the amount claimed by the Plaintiff. They neither carried the consignment nor they were ballies of the said consignment so according to them, the suit is bad in law. The defendant No.3 therefore prayed for the dismissal of the suit.

16. The defendant Nos. 1 to 3 filed their additional Written Statement to the amended plaint and contended that Plaintiff No.2 have not been subrogated to the rights and remedies of the Plaintiff No.1 against defendants over the alleged non delivery of

consignment of 631 cartons. They also contended that if the Plaintiff No.1 have assigned, transferred and abandoned their rights in respect of the suit consignment, they are not entitled to file the present suit. They also denied that by virtue of letter of subrogation cum power of attorney, the Plaintiff No.2 are entitled in law to sue the defendants for recovery of the amount as alleged by the Plaintiff. They also contended that letter of subrogation is not properly stamped and it has to be impounded. They therefore contended that suit is liable to be dismissed against both the Plaintiffs.

17. On these pleadings following issues have been framed by the Court *(CORAM : D.K.DESHMUKH,J).* I have given my findings as mentioned against the same :-

| **POINTS** | **FINDINGS** |
|---|---|
| 1. Whether the Plaintiffs prove that this Hon'ble Court has jurisdiction to entertain, try and dispose of this suit ? | Yes. But only against Defendant No.3 |
| 2. In absence of the 1st defendant's vessel being within the jurisdiction of this Hon'ble Court at the time of institution of the suit, whether the suit as against the 1st defendant vessel is liable to be dismissed ? | Yes |

| | |
|---|---|
| 3. Whether the Plaintiffs prove that the suit is not barred by the law of limitation ? | Suit filed by Plaintiff No.1 is in time. Suit filed by Plaintiff No.2 is time barred, as No.2 is joined as plaintiff after about 4 years from the cause of action. |
| 4. Whether the Plaintiffs prove that they have title to sue the defendants? | Yes but only upto 27/12/97 |
| 5. Whether the 2nd defendants prove that they are discharged from liability upon discharge of the suit consignment from the vessel? | No |
| 6. Whether the 2nd defendants prove that they were only acting as forwarding agents after the discharge of cargo from the vessel ? | No |
| 7. Whether the suit is bad for non-joinder of parties due to non-joinder of the Road Carriers viz ZAO MCT Transit service as co-defendants to the suit ? | No |
| 8. Whether the Plaintiffs prove that the description, quantity and value of the suit consignment that was loaded in the container for carriage by sea ? | Yes |

| | |
|---|---|
| 9. Whether the plaintiffs prove that the suit consignment was delivered to the wrong person/ party as alleged in the plaint? | Yes |
| 10. Whether the Plaintiffs prove that the driver and road carriers have been penalized for violation of a local statute in Russia as alleged in para 4 of the plaint ? | Yes |
| 11. Whether the Plaintiffs prove that the alleged non-delivery of cargo was due to the negligence of the defendants ? | Yes |
| 12. Whether the 3rd defendants who are admittedly the agents of a disclosed principle can be held personally liable to meet or answer the plaintiff's claim? | No |
| 13. Whether the Plaintiffs are entitled to a decree in the sum of Rs. 27,17,806/- together with further interest at 18% p.a. from the date of filing the suit till payment ? | No |
| 14. What order ? | As stated in the final order |
| 15. What relief ? | No relief. |

18. In order to prove the suit claim on behalf of Plaintiff No.1, affidavit of their General Manager B.S. Avari was filed. Plaintiff No.2 filed affidavit of their Dy. Manager Chandrashekhar and affidavit of M.S.

Shrinivasan. However, M.S.Shrinivasan was not presented for cross-examination and as such his affidavit of evidence can not be considered. On behalf of defendants, affidavit of Deonel Goveas, documentation manager of the third defendant was filed. So also affidavit of one Harendra Dalal was filed on their behalf. The Plaintiffs produced several documents including the photocopies of invoices of the goods contained in the cargo as well as the photocopy of bill of lading dated 28/10/1996 issued by defendant No.3 after the 631 cartons containing various pharmaceutical products were shipped. The Plaintiffs also produced copy of the order passed by the State Custom Committee of the Russian Federation, Moscow, Russia in respect of the consignment in question and copy of the notice issued by the Plaintiffs to the third defendant on 09/04/1997. Plaintiffs also produced the letter of subrogation and special power of attorney dated 27/12/1997 executed in favour of Oriental Insurance Company Limited i.e. plaintiff No.2.

19. As against this, defendants have not produced any document.

20. Learned Advocate for the defendants strongly

objected for the production of the documents submitted by the Plaintiff as the said documents were photocopies and not the originals. So far as four invoices are concerned, Plaintiffs witness has stated that the goods have been sent to State Enterprise Pharmacy Warehouse, Moscow, Russia under the above mentioned four invoices and as the originals were sent alongwith the bill of lading the copies have been produced. The contents of the same are duly proved by the Plaintiff. These are the invoices prepared in the office of Plaintiffs. So the said invoices are admitted in evidence.

21. Learned Advocate for the defendants strenuously argued before me that the original bill of lading is not produced by the Plaintiff and no satisfactory explanation for not producing the original is given by the Plaintiff. However, it has come on record that the original bill of lading was sent to the bankers and thereafter, it was returned by the bankers to Plaintiff but the same was lost and hence, the Plaintiff filed the photocopy of the same. Firstly, it must be noted that Plaintiff has given satisfactory explanation as to why secondary evidence is being adduced. Besides this, it must be noted that it is in fact not disputed by the defendants that on 28/10/1996 cargo in question was

shipped on the suit vessel i.e. defendant No.1 through defendant No.2. It is also not in dispute that in the said transaction defendant No.3 acted as an agent of defendant No.2. The defendant No.3's witness has also clearly admitted that Plaintiff company had shipped their goods as mentioned in the plaint and bill of lading was issued. The defendants have referred the said document in cross-examination. So having regard to all these facts, I have no hesitation to accept the said photocopy of bill of lading in evidence.

22. It is in fact not disputed that the Plaintiff company had shipped 631 cartons of various pharmaceuticals on the vessels i.e. defendant No.1. Admittedly, the said consignment was addressed to State Enterprise Pharmacy Warehouse, Moscow, Russia. Not only that but it is in fact not in dispute that the first defendant vessel reached the designated port and thereafter, FCL container containing the Plaintiff's Cargo was to be transported by road to Moscow for delivery at the consignee's warehouse. For that matter, the cargo was entrusted to 'ZAO MCT Transit Service' by the second defendant for onward carriage by road. However, it is Plaintiff's case that the said cargo was not accordingly delivered to the consignee and it was

mis-delivered to some unknown person by the driver of truck who was carrying the Plaintiff's container and thus, ultimately, the consignee did not receive the goods and the Plaintiff No.1 did not receive the price of the same. These facts are in fact not disputed. The main question is whether the Plaintiffs are entitled to recover the loss that has been caused to them by non-delivery of the goods to consignee, in this suit.

**ISSUE NOS.1 AND 2**

23. It is the contention of defendant Nos.1 and 2 that this Court has no jurisdiction to try the present suit because so far as defendant No.1 vessel is concerned, on the date of the filing of the suit, the vessel was not birth within the territorial waters of India and so far as defendant No.2 is concerned it is a foreign company carrying on business in Russia. They are not doing any business in India nor they are having office in India and as such this Court has no jurisdiction to try the suit against the defendant Nos. 1 and 2.

24. Shri Desai, learned Senior Advocate for the Plaintiff submitted that in the instant case Plaintiff has not asked for the arrest of the ship. When goods

were loaded on the vessel, it was within the territorial waters of India. The defendants had agreed to deliver the goods of Plaintiff company to the consignee by carrying it through defendant No.1 vessel to Petersburg and then by road to the consignee's warehouse. The contract between the Plaintiffs and defendants has taken place at Mumbai and as such this Court has jurisdiction to try the present suit.

25. On the contrary, Shri Nichani learned Advocate for the defendants submitted that as on the date of filing of the suit the defendant No.1 vessel was not arrested and as such no action in rem will lie against the vessel. Shri Desai learned senior advocate has placed reliance on a case **M.V. Elizabeth V/s. Harwan Investment and Trading Pvt. Ltd.,Goa AIR 1993 Supreme Court 1014** to support his proposition. However, careful reading of the said authority shows that the Apex Court has not at all laid therein that if the Plaintiff has not prayed for arrest of the vessel then suit will lie against the vessel, if on the day when the contract was entered into with Plaintiff for carrying the goods by particular vessel. On the contrary, in the above cited ruling the Apex Court has observed :-

" An action in rem is directed against the

> ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the Plaintiff in personam. It is, however, imperative in an action in rem that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court is such an action binds not merely the parties to the writ but everybody in the world who might dispute the Plaintiff's claim.“

26. In fact there are various authoritative pronouncements in which similar view has been taken and as such I have absolutely no hesitation to hold that under the circumstances of the case this Court has no jurisdiction to try the present suit against the defendant No.1.

27. So far as the defendant No.2 is concerned admittedly it is a foreign company and they are not

having business in India and in Bombay. Merely because they have appointed defendant No.3 as agent and defendant No.3 agreed to ship the material of Plaintiff on the defendant No.1 vessel through defendant No.2, we can not jump to the conclusion that this Court has jurisdiction to try the present suit against the defendant No.2. It must be noted that admittedly the defendant No.2 has not submitted themselves to the jurisdiction of this Court. On the contrary, they have raised contention that this Court has no jurisdiction. In **World Tanker Carrier Corporation V/s. S.N.P. Shipping Services Pvt. Ltd. and others 1999(1) Bombay Cases Reporter (SC) 196**, the Apex Court has made following observations.

> "The presence of a foreign defendant who appears under protest to contest jurisdiction, can not be considered as conferring jurisdiction on the Court to take action. Unless a foreign defendant either resides within jurisdiction or voluntarily appears or has contracted to submit to the jurisdiction of the Court, it is not possible to hold that the Court will have jurisdiction against a foreign defendant." See in this connection (R.

Vishwanathan V. Rukh-ul-Mulk Sayed Abdul Wajid), 1996(3) S.C.R. 22 : AIR 1963 S.C. 1 (Rajendra Sardar Moloji Nar Singh Rao Shitole V. Shankar Saran), 1963(2) S.C.R. 572 : AIR 1962 S.C. 1737.

28. In this very ruling, it has been specifically mentioned that under the principles of Private International Law, a Court can not entertain action against foreigner resident outside country or the foreigner not carrying on business within the country, unless he submits to the jurisdiction of the Court here. So, merely because the contract between defendant No.2 and Plaintiff has taken place through defendant No.3 at Mumbai, we can not jump to the conclusion that suit against foreign company having no business in Mumbai is maintainable in this Court under the circumstances of the case. So, I have answered point Nos. 1 and 2 accordingly.

**ISSUE NO.4**

29. It is the contention of the defendant that the bill of lading having been endorsed in favour of the consignee, the Plaintiff No.1 has no right, title and interest in the goods and as such Plaintiff is not

entitled to file the present suit. Learned Advocate for the defendant strenuously argued before me that while answering question No.50, even PW-1 has categorically admitted that upon negotiating document through a bank for payment title in the goods passed in favour of the buyer. However, it must be noted that the said witness was in fact asked a legal question and he may not have properly understood the meaning of the said question and correct legal position and as such might have given such answer but that by itself is not at all sufficient to hold that on the date of the filing of the suit, Plaintiff had in fact no right, title and interest in the cargo that was shipped and agreed to be delivered to the consignee by the defendant No.2. In order to substantiate his proposition, he has placed reliance on a case **Kohinoor Carpet V/s. Forbes Gokak Ltd. 2002 (4) BOM.C.R.295** I have carefully gone through the said ruling. The facts of the said case and the facts of the case in hand are quite different. In that case, the bill of lading was endorsed in favour of the consignee and consignee had accepted the bill of lading but deferred the payment. So, by accepting the said bill of lading the title in the goods had in fact transferred to the consignee and as such it was held that the Plaintiff was not entitled to file the suit. However,

in the instant case, it is amply clear that though the bill of lading was endorsed to consignee it was not at all actually received by the consignee. On the contrary, the evidence is that the consignee neither received the goods nor the bill of lading and the accompanying document. So, taking into consideration these peculiar facts, it can not be held that in the instant case Plaintiff's right, title and interest had come to an end by endorsing bill of lading in favour of consignee. So, considering these peculiar facts, I am not inclined to accept the proposition of the learned advocate for the defendant in this behalf.

30. The learned advocate for the defendants has also placed reliance on a case **M/s.J. Harkishandas & Co. V/s. Lloyd Triestino & Anr.** delivered by this Court *(CORAM : D.K. DESHMUKH,J.)* in Admiralty Suit No.73 of 1999. However, the facts of the said case and facts of the case in hand are quite different. In that case, Plaintiffs themselves had admitted that at one point of time the bill of lading was endorsed and negotiated in favour of defendant No.2 and bank had in fact made payment of the goods to Plaintiffs. It is only when subsequently the banks again debited the Plaintiff account for the said amount. Plaintiff started saying

that they have regained the title of the suit goods. Ofcourse, the said contention was also not accepted by the Court. Thus, we find that the facts of the said case and the facts of the case in hand are quite different. As mentioned earlier in the instant case though the bill of lading was endorsed in favour of consignee, the same was not actually received by the consignee at any point of time. Hence, I am not inclined to accept the arguments advanced by the learned Advocate for the defendants in this behalf. Hence I have answered issue No.4 in the affirmative.

**ISSUE NOS.5 TO 7**

31. The learned advocate for the defendants submitted that once the consignment in question was discharged from vessel rails by the defendant Nos.1 and 2 the liability of the said defendants stand discharged. For this proposition, he has drawn my attention to clause-4(A)(i), 4(B)(ii) and clause-7 of the Bill of lading. It would be worthwhile to see what are the said clauses. The same are as under :-

" *4. RESPONSIBILITY*

*A. PORT TO PORT SHIPMENT*

*(i) The Carrier's obligations in respect of the goods shall begin when the goods are accepted*

*at the Ocean vessel's rail at the port of loading and shall continue until the goods are discharged at the Ocean vessel's rail at the port of discharge. The Carrier shall not in any circumstances whatsoever be liable to any loss, damage or delay to the goods (whether or not in his actual or constructive possession) however caused occurring before they are accepted at the Ocean vessel's rail at the port of loading or after they are discharged at the Ocean vessel's rail at the port of discharge.*

*(ii) .....*
*.....*

*(B) COMBINED TRANSPORT*
*The carrier shall be responsible for loss or damage to the following extent but no further :*
*(i) .....*
*.....*

*(ii) With respect to loss or damage howsoever occurring outside the period of responsibility referred to under clause 4(A)(i) above the liability of the Carrier shall be*

*limited to the actual amount recovered by the Carrier in respect of such loss or damage from the party to whom the Carrier has sub-contracted the handling, storage, pre-carriage or oncarriage of the goods.*

*(iii) .....*

*.....*

*(a) .....*

*(b) .....*

*(c) .....*

*(d) .....*

*(e) .....*

*(f) .....*

*(g) .....*

*(h) .....*

*(i) .....*

*.....*

*.....*

*(C) GENERAL (Applicable to both Port to Port shipments and Combined Transport)*

*(i) .....*

*(ii) .....*

*(7) TRANSSHIPMENT AND FORWARDING*

*The Carrier may at any time and for any purpose whatsoever discharge the goods or any part thereof from the vessel whether before or after sailing from the port of loading and/or land to store the same either on shore or afloat, and/or tranship or forward the same by another vessel or other vessels, whether prior to or subsequent to the sailing of the vessel and whether sailing from the port of receipt of the goods or from any port and whether belonging to the Carrier or to any other persons, and/or may forward the same by any mode or method or methods of conveyance whether by water, land or air or otherwise howsoever and whether under one or more Bills of Lading and/or other contracts of on-carriage. In any such case the responsibility of each Carrier acting as such is limited to that part of the transit actually undertaken by him and the Carrier shall not be liable for any loss, damage, or delay howsoever caused to the goods arising after discharge from his vessel in respect of the storage and/or forwarding of the goods after such discharge, the Carrier acts only as forwarding agent, making contracts for*

*such storage and/or forwarding on the terms and subject to the limitation of liability in use by the persons with whom such contracts are made. Unless the value of the goods is declared at the time of shipment and is stated thereon and extra freight as may be agreed upon is paid, the Carrier shall in no event be under any obligation to declare to the oncarrier any valuation of the goods, even though the oncarrier's contract of carriage contains a valuation or limitation of liability less than that contained in this Bill of Lading.*

*If the goods can not be forwarded immediately to destination, any charges incurred for storage be borne by the Owner of the goods. If the goods are forwarded by more that one conveyance the Consignee must take delivery of each portion immediately after arrival. "*

32. It is an admitted position that the defendant No.2 had agreed to deliver the suit consignment to the consignee's warehouse i.e. to State Enterprise Pharmacy Warehouse N1, Moscow, Russia. Admittedly, for that

purpose it was necessary to sent the consignment from Petersburg to Moscow by road and hence, consignment was handed over and given in custody of M/s. ZAO MCT Transit Service. Question arises, whether merely because of the stipulation embodied in clause 4(A)(i) above, liability of defendant No.2 stands discharged. While considering this aspect it must be noted that even the defendant No.3, the agent of defendant No.2 who accepted the consignment has agreed that the said consignment was handed over to them with a direction to deliver the same at the warehouse of the consignee. It is admitted that the consignment in question is of Combined Transport. Consignment was to be carried at Petersburg by defendant No.1 vessel and thereafter also it was the duty of the defendant No.2 to take necessary steps for delivering the said consignment to the consignee at Moscow. Not only that, it is also an admitted fact that the defendant had recovered freight after taking into consideration the fact that they have to deliver the consignment to consignee at Moscow. When such is the position, it can not be said that the liability of defendant No.2 stood discharged once the goods were discharged at the Port. It is true that in clause No.7 it has been mentioned that the liability of the carrier as per clause-7 was limited and was

entitled to recover the amount limited to the actual amount recovered by the carrier in respect of loss or damage from the party to whom the carrier has sub-contracted the handling of the consignment. If this condition is accepted as it is, then it may give rise to a situation that though damage is caused to the consignment or the consignment is lost by the agency to whom the sub-contract is given by the defendants the first carriers, for delivering the consignment to consignee by carrying it in a truck by road, still the owner of the goods may not be in a position to recover the amount of loss, in case the carrier, here defendant Nos.1 and 2 decide not to take any action against their sub-contractor for missing consignment or causing loss. This above mentioned stipulation in fact contemplates that whatever loss is caused by the sub-contractor in carrying forward the consignment then main carrier here defendant Nos. 1 and 2 would take necessary action against the sub-contractor for recovery of the loss. However, in the instant case, we find that though admittedly suit consignment did not reach the consignee through the sub-contractor M/s. ZAO MCT Transit Service, the carrier defendant Nos. 1 and 2 did not take any action against the sub-contractor. So, under the circumstances of the case when the defendants had

also undertaken the responsibility of carrying the consignment further from Petersburg to Moscow, and had recovered charges for the same it was their duty to take care of the said consignment and if the loss is caused at the hands of their sub-contractor, to take action against them. Thus, the carrier is in fact responsible for the non-delivery to consignees. So, I am not inclined to hold under the circumstances of the case that the liability of the defendant Nos. 1 and 2 stood discharged after the time the consignment was discharged from the Vessel rails. We can not ignore the fact that admittedly there was no privity of contract between Plaintiffs and M/s. ZAO MCT Transit Service. So, under such circumstances, there was no chance for Plaintiffs to recover the said amount from M/s. ZAO MCT Transit Service. Considering this aspect it also can not be said that the suit is bad for non-joinder of M/s. ZAO MCT Transit Service as co-defendant. So, I have answered issue Nos. 5 to 7 accordingly.

**ISSUE NOS. 8 TO 11**

33. The plaintiff's witness has stated that after the time the consignment reached Petersburg, the defendant Nos. 1 and 2 gave the sub-contract of carrying the said consignment to consignee's warehouse

by road. However, the truck driver who was carrying the consignment in his truck handed over the said consignment to wrong person who falsely represented that he is the representative of consignee. Not only that he has also stated that as a result of the same, the driver of the said truck was penalized by the State Customs Committee of the Russian Federation on 24/03/1997. The witness has produced the decision of the said committee received by him from the said office. The learned advocate for the defendant argued before me that the said document can not be read in evidence because it is not duly proved by the Plaintiff. However, it must be noted that defendant has stated that he received the said document from the concerned office. If we peruse the said document, it shows that it is bearing necessary stamp of the said office. It is true that there is nothing on record to show that as to who has translated the said decision in English but it must be noted that the English Copy of the said decision is also received by the Plaintiffs from the Custom Department of Russia. So, it can be held that this document has been issued by the concerned office in their regular office transaction and as it is certified by the concerned office, due weightage shall have to be given to this document. It

must be noted that the defendants have also not adduced any specific evidence to show that the consignment in question was actually received by the consignee. So, relying on the above mentioned document it can safely be held that Plaintiffs have proved that the suit consignment was delivered to wrong person as alleged in the plaint.

34. It was argued on behalf of the defendants that the Plaintiffs have in fact not proved the contents of the suit consignment and they have not given any description, quantity and value of the suit consignment. However, if we peruse the evidence of PW-1, it is very clear that he has categorically stated that 631 cartons of different pharmaceutical products were shipped in the defendant No.1 vessel and that when the said cargo was handed over to defendant No.3 who was admittedly working as an agent of defendant No.2 at the relevant time also accepted the said consignment alongwith his attached document and then bill of lading was issued. If we see the said bill of lading then we find that there is mention of 631 cartons and weight of the same. What is more to be noted is that invoice numbers under which different pharmaceutical articles were sent have also been mentioned in the said bill of

lading. The details about the different products are available in the four invoices which are produced by the Plaintiff. So, from all this evidence it can be held that the Plaintiffs have proved that the suit consignment in question was of the value of US$ 75,709/-. From the decision of the State Customs Committee given in respect of the suit consignment, it is very clear that there was total negligence on the part of the truck driver who had taken the sub-contract from the defendant Nos.1 and 2 for carrying suit consignment to consignee. Hence I have answered issued Nos. 8 to 11 accordingly.

**ISSUE NO.3**

35. It is the contention of the defendant that suit is barred by law of limitation. It is also contended that by virtue of the provisions of section 24 of the Multi Model Transportation of goods Act, 1993 action ought to have been taken within 9 months from the date when goods ought to have been delivered. In the instant case, from the decision of the State Customs Committee of the Russian Federation, it is clear that consignment in question was handed over to M/s. ZAO MCT Transit Service on 21/01/1997 or thereabout. The present suit is filed initially only by Plaintiff No.1 on 22/10/1997

and as such suit filed by the Plaintiff No.1 was within time.

36. It is an admitted fact that during the pendency of this suit, Plaintiff sought amendment and Plaintiff No.2 i.e. Oriental Insurance Company Limited was impleaded as Plaintiff No.2. This amendment has been carried out on 09/07/2002 as per the order passed on 09/07/2002 i.e. after a period of about 4 ½ years. It is not mentioned in the order that it will relate back to first date of filing the suit. On the contrary, under the circumstances of the case it must be taken from the date when application for amendment was made. So, question may arise as to whether the suit filed by Plaintiff No.2 is in time. It is an admitted fact that the consignment in question was insured with Plaintiff No.2 and after the time the consignment was lost or handed over to wrong person and was not delivered to consignee, the plaintiff No.1 filed claim with plaintiff No.2 Oriental Insurance Company and then the said claim was settled by Plaintiff No.2 on 27/12/1997 by paying Rs.30,29,732/- to Plaintiff No.1. It is pertinent to note that on that very day, letter of subrogation and special power of attorney has been executed in favour of Plaintiff No.2. It is the

contention of defendants that in view of this letter of subrogation, Plaintiff is in fact not entitled to recover any amount from the defendant. I think that there is much substance in this contention.

37. It would be worthwhile to see some of the contents of this letter. It is mentioned therein :-

> "In consideration of your paying to M/s. UNIQUE PHARMACEUTICAL LABORATORIES (A DIV. Of J.B. Chemicals and Pharmaceuticals Ltd.) having its Registered office at Neelam Centre, 'B' Wing, 4th floor, Hind Cycle Road, Worli, Mumbai-400 025. qa sum of Say Rs. 30,29,732/-(Rupees Thirty Lakhs Twenty-nine Thousand Seven Hundred Thirty Two only) in respect of loss/damage to the goods covered under Certificate No.450 dated 28/10/1996 and/or duly payable thereon insured under Policy No. 124200/371/00000/00300/97/00058 issued by you, we hereby assign, transfer and abandon to you all our actionable rights, title and interest in and to the said goods and proceeds thereof (to the extent provided by law) and all rights and

remedies against Railway Administration and/or Sea Carriers and/or agents of Sea Carriers and/or Port Authorities and/or Custom Authorities and/or any Carriers and/or person whoever is liable in respect thereof."

38. From the above mentioned recitals it is very clear that on 27/12/1997, the Plaintiff No.1 has in fact assigned or transferred their actionable right, title and interest in the consignment in question to Plaintiff No.2 and abandoned their rights in favour of Plaintiff No.2. When such is the position, it must be held that after the said date i.e. 27/12/1997, Plaintiff is in fact not entitled to claim any amount from the carriers as at present plaintiff No.1 is not possessed of any actionable rights against defendant No.1. In fact, that is why we find that even by amendment the Plaintiff No.1 has prayed that the defendants be directed to pay amount of Rs.27,17,806/- to Plaintiff No.2. However, it is pertinent to note that though the suit consignment was already insured on a day when the suit was filed and Plaintiff No.1 was fully aware of such position, the Plaintiff No.1 did not join the Plaintiff No.2 in the suit. It is needless

to say that on 27/12/1997 when Plaintiff No.2 settled the claim with Plaintiff No.1 and in consideration of the same, Plaintiff No.1 transferred or assigned and obtained all their actionable claim in favour of the Plaintiff No.2, Plaintiff No.2 ought to have immediately come forward and joined the present suit. On 27/12/1997, Plaintiff No.2 got the right to proceed against the carrier but we find that the Plaintiff No.2 neither joined the present suit nor filed any separate suit against the carrier for a period of about 4 years and finally was impleaded in this suit as Plaintiff No.2 on 09/07/2002. So, on that day, suit filed by Plaintiff No.2 for recovery of alleged loss of the consignment in question was in fact time barred. Hence, I have answered issue No.3 accordingly.

**ISSUE NO.12**

39. It is the contention of the defendant No.3 that defendant No.3 being agents of disclosed principles, they are not personally liable to meet the alleged loss of the Plaintiffs. It is true that defendant No.3 had accepted the consignment for and on behalf of defendant No.2 and being their agents. But from the evidence of defendant No.3 and from the agreement that has been produced on record, it is very clear that third

defendants are general agents and not special agents of defendant No.2. The defendants No.3 are not working as agents only for the defendant No.2 but also working as agents for some other companies.

40. The learned Advocate for the defendant has therefore submitted that Plaintiff is not entitled to recover any amount from defendant No.3. For this proposition, he has placed reliance on a case **Midland Overseas V/s. M.V. "CMBT Tana" and others AIR 1999 BOMBAY 401** wherein this Court (*CORAM : R.M. LODHA,J.*) has observed that where Plaintiffs claim is founded on non-delivery of the container containing Plaintiffs cargo to the consignee due to alleged negligence and breach of contract of carriage on the part of carriers then as per the provisions of section 230 of the Contract Act it must be pleaded and shown that the principle is undisclosed and the contract, the breach of which is sued on was entered into by the Agent as having contracted personally. Where the contract is entered into by agent contracting on behalf of a foreign principal who is named and disclosed, the agent can not be sued personally nor made personally liable. So, having regard to the above observations also, it has to be held that in the instant case, the Plaintiffs

are not entitled to recover the alleged loss from defendant No.3. Hence I answer issue No.12 accordingly.

**ISSUE NO.13**

41. From the above discussion it is very clear that the Plaintiff No.1 had shipped the consignment in question value of US$ 75,709/-. It is also very clear that the sub-contractor of the carriers namely of defendant No.2 failed to deliver the said consignment to the consignee. They delivered it to a wrong person and as a result of the same, Plaintiff suffered loss. Ofcourse, Plaintiff has recovered the amount of loss from the Insurance Company as the consignment in question was insured with Plaintiff No.2. The rights of Plaintiff No.1 were assigned and transferred in favour of Plaintiff No.2 on 27/12/1997. So, Plaintiffs No.2 could have filed the suit for recovery of the suit amount from the carriers but as I have mentioned earlier, they did not claim the said amount from the carrier in time. Besides this, I have also mentioned that this Court has no jurisdiction to try the present suit against Plaintiff Nos. 1 and 2. I have also held that Plaintiffs are not entitled to recover the amount from defendant No.3. Hence I pass the following order:-

**O R D E R**

The suit is dismissed.

Under the circumstances of the case parties to bear their own costs of the suit.

**(S.R. SATHE,J.)**